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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 21 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a glass and mirror firm. It seeks to employ the beneficiary permanently in the United States as a glazier. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is December 28, 1995. The beneficiary's salary as stated on the labor certification is $14.18 per hour, or $29,494.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated March 18, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE requested original computer printouts from the Internal Revenue Service of tax returns filed with the IRS by the company for the years 1996 to the present. The RFE also requested further documentary evidence of the beneficiary's experience as listed on the Form ETA 750.

In response to the RFE counsel submitted the petitioner's 2000, 2001 and 2002 Form 1120 U.S. Corporation Income Tax Returns. Counsel also submitted a letter from a former employer of the beneficiary detailing the beneficiary's experience as a glazier from 1988 to 1991 and a letter from the beneficiary detailing his own experience as a self-employed glazier from 1991 to 1995. Counsel also requested additional time to submit further financial information.

On appeal, the director determined that the controlling regulation prohibited granting additional time to the petitioner to respond to the request for evidence, citing 8 C.F.R. § 203.2(b)(8). The director then adjudicated the case on the record as it then stood.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

Counsel states on appeal that it was an error for the director to deny the requested extension of time, and that it was an error for the director to find that the petitioner was unable to pay the proffered wage. Counsel's Notice of Appeal dated August 14, 2003 states that a brief and documentation in support of the appeal would be submitted within 30 days. The file also contains a letter from counsel dated October 15, 2003 with a further submission of evidence.

No brief on appeal is found in the record. Therefore counsel's arguments on appeal are those which are stated in the Notice of Appeal.

Counsel argues in the Notice of Appeal that the director erred by failing to grant an extension of time to submit additional evidence. This argument is unsupported by any citation to authority. The director in denying the request for an extension of time had relied on 8 C.F.R. § 103.2(b)(8), which contains the following language: "[T]he applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted." 8 C.F.R. § 103.2(b)(8) (Jan.1, 2003 ed.). The director's decision not to grant an extension of time conformed to the requirements of this regulation.

It appears from the record that the director would have been authorized to deny the petition as abandoned, under 8 C.F.R. § 103.2(b)(13), which states as follows: "If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied." 8 C.F.R. § 103.2(b)(13) (Jan. 1, 2003 ed.). The following subsection further states as follows: "Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record." 8 C.F.R. § 103.2(b)(14) (Jan. 1, 2003 ed.).

In the instant case, the petitioner made no explicit request for a decision on the evidence already submitted, but rather requested an extension of time, as noted above. Had the director then denied

the petition as abandoned the director's decision would not have been subject to appeal. 8 C.F.R. § 103.2(b)(15) (Jan. 1, 2003 ed.) Nonetheless, since the director adjudicated the case on its merits based on the evidence then in the record the director's decision was subject to appeal. 8 C.F.R. § 103.3 (Jan. 1, 2003 ed.) The evidence upon which the director based his decision must therefore be examined in adjudicating this appeal.

The additional documentation submitted by counsel dated October 15, 2003 will also be examined in adjudicating this appeal. Although that evidence was submitted more than 30 days after the Notice of Appeal, the instructions to the Form 290B Notice of Appeal permit extensions of time to be granted. In the petitioner's response to the RFE, counsel had stated that delays by the Internal Revenue Service prevented the submission of IRS tax transcripts within the time specified by the RFE. Good cause is therefore found for granting an extension of time for submission of evidence on appeal. The documentation submitted with counsel's letter dated October 15, 2003 is therefore deemed to have been timely submitted on appeal.

Counsel's cover letter of October 15, 2003 states that enclosed documentation includes "Tax Returns Transcript for the years 1995" (sic). Nonetheless, the enclosed transcript pertains not to the year 1995 but rather to the years 2001 and 2002. Counsel's letter also states that certified copies of tax returns for the years 1996, 1997, 1998 and 1999 had been previously submitted. However, no such documentation is found in the file. The letter also states that W-2 forms showing payments of wages by the petitioner to the beneficiary for 1995 and 1996 are enclosed. The letter correctly describes those documents.

An analysis of the tax documentation submitted by counsel in the proceedings before the director and on appeal reveals the following information for each of the years covered, with the figures shown below for net current assets calculated from the current assets and current liabilities on schedule L of each return.

2000

Total income	$389,426
Taxable income before net operating loss deduction and special deductions	16,050
Taxable income	0
Net current assets	-87,705

2001

Total income	$435,915
Taxable income before net operating loss deduction and special deductions	17,939
Taxable income	0
Net current assets	-66,460

2002
Total income $418,306
Taxable income before net operating loss deduction and special deductions 29,971
Taxable income 0
Net current assets ..... -35,033

The W-2 Forms submitted by counsel show payments by the petitioner to the beneficiary in wages, tips and other compensation for 1995 in the amount of $9,280 and for 1996 in the amount of $15,680.

After reviewing the federal tax information summarized above it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The W-2 forms submitted for 1995 and for 1996 show payments to the beneficiary in amounts much lower than the proffered annual wages of $29,494.40. No other financial information was submitted for the years 1995 through 1999. Furthermore, the information for 2000 through 2002 indicates that only in the year 2002 did the petitioner potentially have sufficient funds to pay the annual wages offered of $29,494.40. Yet even in that year, net current assets were negative in an amount greater than the offered yearly salary.

The petitioner's evidence fails to establish that the petitioner had sufficient available funds to pay the salary offered for the relevant time period. The director's decision on the issue of the petitioner's ability to pay the proffered wages was therefore correct.

The other issue raised in this case in the proceedings below was whether the petitioner had established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. In response to the RFE the petitioner submitted documentary evidence concerning the beneficiary's experience. The director's decision of July 14, 2003 makes no reference to the issue of the beneficiary's qualifications, thereby implicitly finding that the petitioner's submissions on that issue in response to the RFE were sufficient. A review of the record on appeal indicates no reason to question the director's finding on this issue.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. With regard to the issue of the petitioner's ability to pay the proffered salary as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence, the petitioner has not met that burden.

ORDER: The appeal is dismissed.